IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 20, 2006 Session

STATE OF TENNESSEE v. SAMANTHA MARIE DANIEL

Appeal from the Circuit Court for Marion County
No. 6533 J. Curtis Smith, Judge

No. M2005-01211-CCA-R3-CD - Filed October 30, 2006

The Appellant, fifteen-year-old Samantha Marie Daniel, was convicted by a Marion County jury of the first degree murder of her grandfather, Eugene Daniel, and the attempted first degree murder of her grandmother, Mattie Jo Daniel. She was later sentenced to concurrent sentences of life and twenty years for the respective convictions. On appeal, Daniel raises the following issues for our review: (1) whether she was denied her right to due process in the juvenile court of Marion County; (2) whether the trial court erred in denying her motions to quash the indictment and strike the jury venire; (3) whether the trial court erred in denying her motion to suppress her confession; (4) whether she was unfairly denied a bench trial; (5) whether the trial court erred in denying her request for a jury instruction on the presumption of second degree murder; (6) whether the evidence was sufficient to support her convictions; (7) whether the trial court erred in admitting a hearsay statement as an excited utterance; (8) whether she was denied the right to a fundamentally fair trial due to the introduction of misleading or intentionally false testimony; (9) whether the trial court erred in admitting evidence of her prior allegations of abuse against a third party; and (10) whether she was denied due process because her confession was not tape recorded. After a review of the record, we affirm Daniel's convictions for first degree murder and attempted first degree murder.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Philip A. Condra, District Public Defender, Jasper, Tennessee, for the Appellant, Samantha Marie Daniel.

Paul G. Summers, Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Sherry Gouger, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

At 3:13 a.m. on November 18, 2002, a dispatcher at the Marion County Sheriff's Department received a phone call concerning the shootings of Mattie Jo Daniel and Eugene Daniel at 252 Jones Crossing in Whitwell. Detective Gene Hargis responded to the scene and found Eugene Daniel deceased and Mattie Joe Daniel in critical condition. Mrs. Daniel revealed that her granddaughter was the perpetrator.[1]

Chief Detective Wayne Jordan arrived at the scene around 4 a.m. Based upon the information he received from the dispatcher, Jordan, along with Tennessee Bureau of Investigation (TBI) Special Agent Billy Miller, began searching for the Appellant. Around 2 p.m., Jordan received the first of a series of phone calls from the Appellant. Initially the Appellant advised Jordan that she was not prepared to turn herself in. The Appellant called a second time and requested to speak to Kerry Bynum, a teacher and counselor at Marion County High School where the Appellant attended school. After two additional calls to Jordan, the Appellant arrived at Marion County High School. Detective Jordan patted down the Appellant and escorted her inside the school where Agent Miller took her into custody. The Appellant was transported to the Marion County Justice Center where she was interviewed. Miller advised the Appellant of her constitutional rights, as well as her right to have a parent or guardian present. Unable to provide contact information for her mother, the Appellant requested the presence of a close friend, Helena Richardson, who arrived shortly thereafter. The Appellant signed a waiver of rights and gave a statement to the officer.

In her statement, the Appellant related that on Friday, November 15, 2002, she attended a party at the home of Jessie Royer, a female friend of the Appellant. According to the Appellant, she frequently left her grandparents' home without permission. On this particular occasion, she explained that she had left her grandparents' home without permission and had been gone for three or four days. While at Royer's party, the authorities arrived and returned the Appellant to her grandparents' home. Upon arriving home, the Appellant immediately began to argue with her grandparents because she would not tell them where she had been staying for the three nights she was absent. The argument continued until early Saturday morning. On Sunday evening, the Appellant, who had her learner's permit, drove her grandparents to a restaurant in Manchester for dinner. During the ride home, the Appellant asked her grandparents if she could attend a party at Royer's house, with the request being denied. Upon returning home, Mrs. Daniel thought the tensions had eased and walked to her son's nearby home, leaving the Appellant in her bedroom. The Appellant stated that while she was in her bedroom, she kept "getting madder and madder about the stuff that had happened between [her] and [her] grandparents." She then entered the bedroom in

[1] Mr. and Mrs. Daniel were the Appellant's biological grandparents and adoptive parents. The Appellant's parents divorced when the Appellant was eight weeks old, and her father, Mike Daniel, was awarded custody. The father was an alcoholic and was unable to care for his daughter. At the age of twelve, the Appellant was adopted by her grandparents.

which her grandfather was sleeping and removed a shotgun hanging on the wall and a number of shells from a drawer before returning to her room to load the gun. The Appellant related:

> I walked back into my grandfather's room. He was asleep. He was lying on his side. So when I walked in the door, he was facing me. I walked probably one step inside the door. I pointed the gun at his head, I turned my head and pulled the trigger. I fell down on the floor because I could not believe what I had done. I had heard my grandmother's door open. And I was walking back toward my room my grandmother came around the edge of the kitchen. I cocked the gun again and I shot her. She fell.
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> Then I went and unplugged the phones. There are three phones in the house, there are two in the living room and one in the kitchen. I then ran back into my bedroom and started getting dressed because I was in my boxers and T-shirts when that happened. As I was getting dressed I heard my grandmother coming back towards my room. I sat down in the doorway. The gun was propped against my door frame. My grandmother was walking towards me. I told her to get away. She kept walking towards me. She was not saying anything. I grabbed the shotgun and put another shell in it, and cocked it. I had to stand up to get the bullet because it was lying on the bed. When I got the shell and came back to the door with the gun, my grandmother was standing in the doorway of my grandpa. The door to his room was halfway closed. I then shot my grandmother again.

Mrs. Daniel testified that she was unable to summon any help because her right arm was hanging from her body by one artery and she was suffering from a gunshot wound to her abdomen. She crawled to her husband's bedroom and managed to crawl into the bed with her deceased husband, covered them both, and said a final prayer.

The Appellant stated that she took her grandmother's cell phone and left the house in her grandparents' red Camero. She then drove to the home of her high school friend, Jessica Barnes.

Barnes testified that the Appellant arrived at her house around midnight. The two went to the Golden Gallon convenience store so that the Appellant could call her boyfriend, Daniel Gilbert. The Appellant then changed her bloody clothing at Barnes' home, and Barnes poured gasoline over the clothing and burned them. The Appellant told Barnes' mother that she had killed her grandparents. Barnes' mother advised the Appellant that she should turn herself in. Fearing that her grandparents' vehicle was easily identifiable, the Appellant drove the red Camero back to her grandparents' house, with Jessica following in her car. They then returned to the Barnes' home where they spent the night. The next day, the Appellant, Jessica, and Jessica's brother drove to Chattanooga and into Alabama "just riding around" and talking. Eventually, the Appellant called the Marion County Sheriff's Department and reported the shootings.

A petition was filed in the Marion County Juvenile Court alleging the delinquent acts of criminal homicide and attempted criminal homicide. Following the Appellant's transfer from

juvenile court, an indictment was returned by a Marion County grand jury charging the Appellant with first degree premeditated murder and attempted first degree premeditated murder. The Appellant's trial commenced on April 27, 2004, with the jury returning guilty verdicts for first degree murder and attempted first degree murder on May 1, 2004. The Appellant was sentenced to concurrent sentences of life and twenty years in the Department of Correction. A hearing on the motion for new trial was held on December 14, 2004, which was later denied. Notice of appeal was filed on March 14, 2005.

Analysis

I. Due Process in Juvenile Court

The Appellant asserts that, as a result of cumulative errors, she was denied the right to due process in the Juvenile Court of Marion County. First, she contends that "the individual serving as juvenile judge [Judge Charles Jenkins, Sr.] was not elected or duly appointed to the position." The record reflects that Judge Jenkins presided at the Appellant's transfer hearing in the juvenile court. Proof at the evidentiary hearing on this issue established that Judge Ben L. Hill, III was elected to the office of Judge of the Juvenile Court of Marion County in 1998. Sometime in 2001, Judge Hill's health declined to the point that he was unable to regularly attend court. Testimony by the county mayor indicated that for the twenty-three months preceding these events, Judge Charles Jenkins, Sr. had presided over all juvenile court proceedings due to Judge Hill's illness and was regarded in the community as the juvenile court judge. On August 28, 2001, Chief Justice E. Riley Anderson entered a standing order, apparently at the request of Judge Hill, for the designation of Judge Jenkins, along with four other juvenile court judges from neighboring counties, to serve as substitute juvenile judges of Marion County should Judge Hill find it "necessary to be absent from Court . . . ." The order further recites that the authority to designate the five judges derives from "existing statutory and inherent powers pursuant to the provisions of Title 17 and section 16-15-209 of Tennessee Code Annotated and Rule 11 of the Rules of the Supreme Court."[2]

The Appellant contends that the "Supreme Court has no authority under Title 17, Rule 11 or T.C.A. § 16-15-209 to appoint a successor" to the office of judge of the juvenile court of Marion County. She argues that there are no provisions within Title 17 which permit the supreme court to designate a substitute judge when the judge, as in this case, is unable, from sickness or physical

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[2]Tennessee Code Annotated section 16-15-209 as relevant provides:

> (a) If the judge of a court of general sessions or juvenile court finds it necessary to be absent from holding court, such judge may seek a special judge in accordance with the requirements of and in the numerical sequence designated by this section:
>
> . . .
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> (2) In a county with only one (1) general sessions judge or juvenile court judge, the judge shall seek to find any current, former, or retired judge, who will, by mutual agreement, sit as special judge. The special judge shall serve by designation of the chief justice of the supreme court.

T.C.A. § 16-15-209(a)(2).

disability, to attend and hold court. Indeed, the Appellant asserts that when disability arises which prevents the judge from holding office, as is the situation in this case, "the Chief Justice of the Supreme Court may declare a disability, but it is the Governor who fills the position," not the chief justice. T.C.A. § 17-2-116(a)(1).[3] While no appellate decision is found construing the application of Tennessee Code Annotated section 17-2-116, support for the Appellant's argument is found in Tennessee Attorney General Opinion No. 86-185. *See also Ferrell v. Cigna Property and Casualty Ins. Co.,* 33 S.W.3d 733, 739 (Tenn. 2000). "Although opinions of the Attorney General are not binding on courts, government officials rely upon them for guidance, therefore [such] opinion[s] [are] entitled to considerable deference." (citing *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995)). The Attorney General's opinion addressed the questions:

> (1) In the event that a Judge of the Hamilton County General Sessions Court becomes disabled due to an illness that may require a lengthy period of recovery (at least six months), may a special judge be appointed to serve during the period of such disability?
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> (2) If such a judge may be appointed, by whom is this interim appointment to be made?

Relying upon the statutory provisions of Tennessee Code Annotated section 17-2-116(a), the Attorney General opined that in the event of such extended disability a special judge may be appointed to serve during the period of the disability and the Governor would make the appointment of the special judge.[4]

The Appellant acknowledges that interchange and appointment of substitute judges on a temporary basis is permitted under Title 17; however, this requires no action by the supreme court. Moreover, the Appellant acknowledges that "T.C.A. 16-15-209 authorizes a judge who 'finds it necessary to be absent from holding court' to seek a special judge from current, former or retired judges to sit by mutual agreement. The person so selected is then designated by the Chief Justice to sit. T.C.A. 16-15-209(a)(2)." While the Appellant suggests that the procedural requirements of section 209(a)(2) were not strictly followed, she nevertheless asserts that this statutory provision is inapplicable when the "sitting judge cannot perform his duties."

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[3] Tennessee Code Annotated section 17-2-116(a) provides in pertinent part:

> When any of the judges of the circuit courts, criminal court, other special courts, or courts of general sessions . . . is unable from sickness or other physical disability to attend and hold any of the courts at the time and place required by law, the governor shall appoint and commission a special judge who shall have the same qualifications as the regular judge to attend and hold such courts for and during the absence or disability of any such judges.

[4] The Attorney General acknowledged that a vacancy in a county office is filled by the county legislative body. "However, the situation presented in the instant opinion request is not of a vacancy in an office . . . such as would be occasioned by a death or resignation, but one of illness and a lengthy period of recovery during a term of office." *Id.*

Regardless, the specific provisions of Title 17 challenged by the Appellant and Tennessee Code Annotated section 16-15-209 (2003) are not exclusive of the supreme court's authority to designate judges. Tennessee Code Annotated section 16-3-501 (2003) provides that "[i]n order to ensure the harmonious, efficient and uniform operation of the judicial system of the state, the supreme court is hereby granted and clothed with general supervisory control over the inferior courts of the state." Moreover, the powers of the supreme court are full, plenary and discretionary. T.C.A. § 16-3-504. As such, the supreme court in the exercise of its supervisory authority over the courts of this state, as evidenced by its order of August 28, 2001, gave sufficient color of right or authority for Judge Jenkins to discharge, as a de facto judge, the duties of the office of juvenile judge of Marion County. Finally, we would observe that as an intermediate appellate court, we are without authority to overrule an order of the supreme court, and, for this reason and those stated above, we decline the Appellant's urging to do so.

Next, the Appellant contends that "the individual exercising the function as Clerk was a Youth Services Officer, neither duly elected, appointed or serving at the request of and under the authority of the County Clerk of Marion County," and "no minute book(s) reflecting the Court's orders were maintained." In support of this contention, the Appellant asserts that Janet Thompson, Youth Services Officer for the Marion County Juvenile Court, and two probation officers improperly served as Deputy Juvenile Court Clerks and that juvenile court records were improperly maintained in electronic form. We would agree that the duties of the Youth Services Officer, which are defined in Tennessee Code Annotated section 37-1-106 (2003), do not encompass the duties of the Juvenile Court Clerk. Nonetheless, we conclude that the Youth Services Officer's performance of various clerical functions of the office of the Juvenile Court Clerk neither implicated the Appellant's due process rights nor resulted in prejudice to the Appellant. Moreover, we conclude that no impingement of due process resulted from the clerk's failure to properly maintain the records of the court.

II. Motions to Quash Indictment and Strike Jury Venire

Next, the Appellant challenges the trial court's refusal to grant her motions to quash the indictment and strike the jury venire because the grand and petit juries were not properly impaneled pursuant to Tennessee Code Annotated sections 22-2-302 and 22-2-304 (2003). She presents the following improprieties in support of her argument:

> (A) A jury commissioner acknowledged that handicapped individuals were systematically excluded from jury service.
>
> (B) A jury commissioner acknowledged that self-employed individuals were systematically excluded from jury service based upon the jury commissioner's determination - without a hearing - that service would cause a hardship to those individuals.

(C) The Circuit Court Clerk maintained none of the records required by Tennessee Code Annotated sections 22-2-302 and 22-2-304.

Prior to trial, the trial court conducted a hearing on the Appellant's "Motion to Strike Venire" and "Motion to Quash Indictment." The trial court denied both motions by written order on April 23, 2004.

Our supreme court has acknowledged the constitutional requirement of an impartial jury drawn from a fair cross-section of the community. *State v. Bell*, 745 S.W.2d 858, 867-68 (Tenn. 1998) (quoting *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986)). "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id*. However, as observed in *Bell*, the fair cross-section principle must have much leeway in its application. *Id*. at 861.

This court has previously followed the three-prong test promulgated by the United States Supreme Court in determining whether the fair cross-section requirement has been violated:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

Cooper v. State, 847 S.W.2d 521, 533 (Tenn. Crim. App. 1992) (citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979); *State v. Nelson*, 603 S.W.2d 158, 161 (Tenn. Crim. App. 1980)).

The Marion County Circuit Court Clerk testified that the jury pool is "generated from a Department of Safety listing of all licensed drivers from Marion County. Two reports are then prepared, one of prospective grand jurors and one of prospective petit jurors." Jury Commissioner Roby Hall testified that, along with the other jury commissioners, he examined the names on the lists and "if we find people that are disabled, maybe we have some self-employed and we know they can't afford to be off from work and you know various reasons then we'd mark them off." He added, "some of the real older people we would mark off, because we didn't know about health conditions and some we knew were in good health, you know, and able to serve we left them on there." They would also eliminate others from the list whom they believed resided in adjacent counties.

Tennessee Code Annotated section 22-1-103 (2003) allows exemption from jury service for certain occupations and for specified disabilities.[5] The occupational and disability exemption, however, is personal and must be claimed by the prospective juror who is entitled to the exemption,

[5] *See also* T.C.A. § 22-1-104 (2003).

otherwise the exemption is waived. *Cooper*, 847 S.W.2d at 533. In this regard, the Marion County jury commissioners were in error in their exclusion of prospective jurors based upon the commissioners' determination of disability or self-employment status. However, the fact that an incorrect procedure was followed does not automatically equate with constitutional error. *Id*. The term "distinctive group within the community" includes consideration of the following factors: (1) the presence of some quality or attribute which "defines and limits" the group; (2) a cohesiveness of "attitudes or ideas or experience" which distinguishes the group from the general social milieu; and (3) a "community of interest" which may not be represented by other segments of society. *State v. Caruthers*, 676 S.W.2d 935, 939 (Tenn. 1984) (citing *United States v. Test*, 550 F.2d 577 (10th Cir. 1976)).

We are unable to conclude that the Appellant has shown that the excluded disabled or self-employed persons constituted a distinctive group within the community. *See Cooper*, 847 S.W.2d at 534 (exclusion of doctors and lawyers does not violate cross-section of community guarantee as there is no evidence that persons from these professions share unique attitudes or ideas which are not represented by other segments of society); *State v. Blunt*, 708 S.W.2d 415 (Tenn. Crim. App. 1985) (exemption of jurors over 65 years of age is not considered a distinctive group). Accordingly, we conclude that the Appellant has failed to demonstrate that she was not afforded a fair trial by an impartial jury drawn from a fair cross-section of the community. Moreover, we conclude that although the record-keeping functions of Tennessee Code Annotated sections 22-2-302 and 22-2-304 were not adhered to, nonetheless, without more, this claim is insufficient to quash the entire venire.

III. Motion to Suppress

The Appellant argues that the trial court should have suppressed her statement because it was involuntarily given and violated her due process rights under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Specifically, she asserts that the form language used by the TBI advising her of her Fifth Amendment rights was erroneous and that Detective Jordan tricked her by assuring her that she would not be arrested and that he would help her if she turned herself in.

Regarding the *Miranda* warnings as recited to the Appellant from a printed form, she argues that because the TBI language does not track *Miranda*, the admonishments, therefore, were misleading and left the impression that "counsel's role is de minimus." Specifically, she claims that these warning omit the terms "will be used" and the right to counsel "prior to interrogation." The warnings given to the Appellant read as follows:

> Before we ask you any questions, you must understand your constitutional rights:
> You have the right to remain silent and you need not answer any question;
> If you do answer questions, your answers can be used as evidence against you in court;
> If you cannot afford to hire a lawyer, one will be provided to you without cost;

> If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering questions at any time until you talk to a lawyer.

We conclude that these warnings adequately serve the purpose of *Miranda*. The Appellant was fully apprised of her constitutional rights regardless of the language used.

The Appellant also argues that her statement was involuntary because she was "tricked or cajoled" into a waiver of her Fifth Amendment rights. She asserts that this trickery resulted from Detective Jordan's assurance that if she turned herself in, he would not arrest her and that he would see that she got help.

As previously noted, the proof reflects that the Appellant placed three calls to Detective Jordan on the afternoon following the crimes. During each of these conversations, the Appellant inquired as to whether she would be arrested upon her return to Marion County and whether she would be tried as an adult. In each of the conversations, Jordan advised the Appellant that she should turn herself in, and, if she did, he would try to help her. During one of the phone calls, the Appellant requested that she be placed in phone contact with Mrs. Bynum, one of her high school teachers and counselor. After the fourth call, the Appellant agreed to meet Detective Jordan and Mrs. Bynum at the high school. Approximately two to three hours after the first phone call was made, the Appellant appeared at the school. Detective Jordan acknowledged that he and/or Mrs. Bynum "probably" told the Appellant that, "We can't help you if you don't come in." After arriving at the high school, the Appellant was escorted into a building where she was taken into custody by TBI Agent Miller. The Appellant was transported to the Marion County Justice Center where Agent Miller advised her of her rights. Also, he told the Appellant that she had the right to have a parent or adult present during the interview. The Appellant requested that her adult friend, Helena Richardson, be present, which was permitted. Tim Murphy, Youth Services Officer for Marion County, was also present. After acknowledging her rights, the Appellant provided a detailed statement of her involvement in the crimes.

In denying the Appellant's motion to suppress her statement upon grounds of involuntariness, the trial court found that the fifteen-year-old tenth-grade student possessed reasonable intelligence, was aware of the required *Miranda* warnings, was properly advised of her rights and executed a written waiver of those rights, was accompanied by a friend throughout the entire interview period, and was given food and breaks when requested. As such, the trial court found the Appellant's statement was voluntary. The record does not preponderate against these findings.

As observed by our supreme court in *State v. Smith*, 933 S.W.2d 450 (Tenn. 1996):

> Promises of leniency by state officers do not render subsequent confessions involuntary *per se*: "'The Fifth Amendment does not condemn all promise-induced admissions and confessions; it condemns only those which are *compelled* by promises of leniency.'" *Kelly*, 603 S.W.2d at 729 (*quoting Hunter v. Swenson*, 372 F. Supp. 287, 300-01 (D.C.Mo.1974)). The critical question is "'whether the

> behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . .'" *Id*. at 728 (quoting *Rogers*, 365 U.S. at 544).

Id. at 455-56 (emphasis added).

After review of the totality of the circumstances surrounding the giving of the statement, we conclude that the proof fails to establish that the statement was in any manner compelled or otherwise involuntarily obtained.

IV. Denial of Bench Trial

The Appellant asserts that she executed a proper motion to waive a trial by jury and that "the State's refusal to consent to this waiver was arbitrary and an abuse of the power of prosecution." She further claims that Tennessee Rule of Criminal Procedure 23 is unconstitutional because "it infringes upon a fundamental right contained in the Sixth Amendment." Tennessee Rule of Criminal Procedure 23 addresses a defendant's right to a trial by jury, as well as the waiver of such right:

> A waiver of a jury trial must:
>
> (A) be in writing;
> (B) have the consent of the district attorney general; and
> (C) have the approval of the court.

Tenn. R. Crim. P. 23(b)(2). The record contains a waiver of jury trial form signed by the Appellant on April 21, 2004, and witnessed by the Public Defender, Philip A. Condra. A hearing was held on April 23, 2004, at which the State objected to such waiver. The trial court entered an order denying the Appellant's motion to waive a jury trial on December 14, 2004.

Just as there is not a constitutional right to plead guilty, there is no such constitutional right to a bench trial. Rule 23 of the Federal Rules of Criminal Procedure, upon which this state's Rule 23 was modeled, contains virtually the same language as our Rule 23. Both rules permit waiver of a jury trial only with the consent of the "district attorney general" or "government," as well as with the approval of the trial court. Fed. R. Crim. P. 23; Tenn. R. Crim. P. 23. In *Singer v. U.S.*, 380 U.S. 24, 85 S. Ct. 783 (1965), the United States Supreme Court upheld Federal Rule 23 as constitutional against a challenge identical to the one presented here, thus, providing compelling authority for the conclusion that our Rule 23 is likewise constitutional. In *Singer*, the Court expressly affirmed the limitation that before a defendant's waiver of trial by jury could be obtained, the government's consent was required. *Id*. at 35; 85 S. Ct. at 790. This holding reflects the view that a trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of disputed issues of fact in criminal cases and that the state or government, as a litigant, has a legitimate interest in the selection of the tribunal. *Id*. The Appellant offers no reason why a jury trial would result in prejudice in this case. As such, we conclude that the Appellant's claim is without merit.

V. Jury Instruction on the Presumption of Second Degree Murder

The Appellant contends that the trial court should have instructed the jury that the law presumes a homicide to be a second degree murder and that the State must prove the premeditation and deliberation necessary to elevate the crime to first degree murder. *See State v. Brown*, 836 S.W.2d 530, 543 (Tenn. 1992). In *State v. Jackson*, 173 S.W.3d 401, 407 (Tenn. 2005), our supreme court held that "based on the current statutory scheme, no presumption is engaged to place a killing within any of the categories of criminal homicide. Rather, in order to convict a defendant of any of the categories of criminal homicide, the State must prove each element of the offense beyond a reasonable doubt. T.C.A. § 39-11-201 (2003)." The Appellant submits that the court in *Jackson* "chided the Court of Criminal Appeals for misapplying" *Brown* in a series of cases decided between 1992 and 2004, and she contends that because her charges arose during this period of misinterpretation, she was justified in relying upon these opinions. However, we conclude that the trial court correctly denied the Appellant's request for a jury instruction on the presumption of second degree murder. Reliance upon opinions indicating that the presumption still existed does not justify continuing the error.

VI. Sufficiency of the Evidence

The Appellant asserts that the evidence presented at trial was insufficient as a matter of law to support either of her convictions. Specifically, she claims that as a fifteen-year-old, she was incapable of forming premeditation. In considering this issue, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after reviewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). As in the case of direct evidence, the weight to be given circumstantial evidence and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958) (citations omitted).

In support of the Appellant's argument that she was incapable of premeditation because of her age, she relies upon the expert testimony of Dr. Mark Peterson. At trial, Dr. Peterson, a physician psychiatrist, testified that he treated the Appellant in September, 2002, while the Appellant was a patient at Cumberland Hall, an adolescent treatment facility. The Appellant's fourteen-day admission to Cumberland Hall occurred about two months prior to the shooting of her grandparents. Her admission resulted from the fact that she was a frequent "runaway" and was suffering from

depression. The Appellant asserts that Dr. Peterson testified that "this 15 year old lacked the mental ability to exercise judgment and planning." Dr. Peterson testified in detail at trial about the Appellant's treatment and generally about the physical development of the parts of the brain which control judgment; but, he did not testify regarding the development of the Appellant's brain or that she, specifically, was incapable of exercising judgment. The following are pertinent portions of Peterson's testimony:

> Q: [D]oes a 15 year old as a medical function of the brain have the same capacity to – exercise judgment as a person at 19, 20 or 21?
>
> A: No, they do not, and that's because the frontal lobe specifically is a area of the brain that's still making a huge number of connections. It's the last area of the maturation process in the central nervous system and it's very well known that a 15 year old, for instance, doesn't have the ability to make plans and thoughtful nature decisions that an 18 year or 20 year old would have. That's quite well known, it's reflected in our society's laws, norms, and just in general how we approach people.
>
> Q: Let me ask you this is there a point in time that the – that that process of maturation and thought kind of peaks out?
>
> A: As I mentioned to you medically it's probably age 20 is when the full maturation process in 99 percent of individuals growing is – is peaked out.

Dr. Peterson examined the Appellant's mental status and found that her cognition and intelligence were normal and that she had the capability of making good grades. Her final discharge diagnosis was major depression, severe single episode; however, there was no diagnosis of a personality disorder. While at Cumberland Hall, Dr. Peterson prescribed two anti-depressant medications, Effexor and Remeron, to the Appellant, and he recommended that she continue to take them. Her condition was stable, and she was not depressed when he returned her to the custody of her grandparents.

"Premeditation" is an act done after the exercise of reflection and judgment. T.C.A. § 39-13-202(d) (2003). "Premeditation" means that the intent to kill must have been formed prior to the act itself; however, it is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. *Id*. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion to be capable of premeditation. *Id*. Therefore, in order to convict the Appellant of the indicted offenses, the State was required to prove beyond a reasonable doubt that she killed her grandfather with "premeditation" and that she attempted to kill her grandmother with premeditation. Whether premeditation is present is a question of fact for the jury, and it may be inferred from the circumstances surrounding the commission of the crime. *State v. Berry*, 141 S.W.3d 549, 565-66 (Tenn. 2004); *State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000); *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998). There are several factors which tend to support the existence

of premeditation, including: (1) the use of a deadly weapon upon an unarmed victim; (2) the particular cruelty of the killing; (3) declarations by the defendant of an intent to kill; (4) evidence of procurement of a weapon; (5) preparations before the killing for concealment of the crime; and (6) calmness immediately after the killing. *Suttles*, 30 S.W.3d at 261.

After a review of the record in a light most favorable to the State, we conclude that the evidence is legally sufficient to support the jury's verdict of both first degree premeditated murder and attempted first degree premeditated murder. The record reflects that the Appellant obtained the shotgun and shotgun shells from her grandfather's room, returned to her room where she loaded the shotgun, and then reentered the room in which her grandfather was sleeping, prior to shooting him in the face at close range. When her grandmother returned home, the Appellant pointed the gun at her grandmother while Mrs. Daniel exclaimed, "Oh, God, Baby, please no." The Appellant, nevertheless, shot her grandmother, nearly blowing off her right arm. Then she shot her grandmother in the abdomen. The Appellant then reloaded the shotgun and shot her grandmother a third time as Mrs. Daniel tried to hide behind a partially closed bedroom door. The Appellant disconnected all the telephone lines and took her grandmother's cell phone before fleeing in her grandparents's red Camero. The Appellant drove to her friend Jessica Barnes' house where she burned her bloody clothes, before returning the Camero to her grandparents' home. She spent the next day hiding at the Barnes' house and driving out of town to avoid detection. Regardless of her young age, the circumstances surrounding the shootings, both before and after, demonstrate premeditation. Dr. Peterson's testimony does not contradict the State's proof that the Appellant acted with premeditation when she shot and killed her grandfather while he slept and then shot her grandmother three times, as she pleaded for mercy and tried to hide behind a door. Accordingly, we conclude that the Appellant's challenge to the sufficiency of the evidence is without merit.

VII. Admission of Hearsay Statement As An Excited Utterance

Next, the Appellant argues that it was error for the trial court to allow Investigator Gene Hargis to testify that the Appellant's grandmother identified the Appellant as the perpetrator of the crime when he located her in the home. The Appellant asserts that the statement did not qualify as an excited utterance under Tenn. R. Evid. 803(2). We disagree.

Investigator Hargis and other officers arrived at the scene and entered the home through the back door. They announced their presence and, in response, heard a faint voice calling from the rear of the home. Proceeding to the area from which the voice had come, Hargis found a woman lying in bed who stated that she had been shot. She further advised Hargis that her husband had been shot as well and was dead. Hargis noted that the woman, whom he recognized as Mrs. Daniel, was in critical condition. Hargis testified that while they were waiting for emergency medical personnel to arrive, Mrs. Daniel indicated who it was that had shot her.

At this point in his testimony, the Appellant objected to the testimony as hearsay. The State responded that the statement was an excited utterance because Mrs. Daniel "had had her arm shot off, she'd been shot through the belly, probably bleeding to death, I think she's still under the

influence of the excited, the startling event." The court agreed that the statement met the requirement for an excited utterance and overruled the objection. Hargis was then allowed to testify that on two separate occasions Mrs. Daniel "said that her granddaughter, Samantha, had shot her. Told myself and then Sheriff Burnett as she was exiting the house."

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801. Hearsay statements, in general, are inadmissible. Notwithstanding, the reliability and circumstantial guarantees of trustworthiness of certain nontestimonial statements have permitted courts to carve out various limited exceptions to the hearsay rule. One such exception provided for by the rules is for the excited utterance. Tenn. R. Evid. 803(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Tenn. R. Evid. 803(2); *see also State v. Gordon*, 952 S.W.2d 817, 819 (Tenn. 1997). In order for a statement to qualify as an excited utterance: (1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant is under the stress or excitement from the event or condition. *Gordon*, 952 S.W.2d at 829. The underlying theory of this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *State v. Land*, 34 S.W.3d 516, 628-29 (Tenn. Crim. App. 2000). "The ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." *State v. Smith*, 857 S.W.2d 1, 9 (Tenn. 1993) (citations omitted). Moreover, "it is well established that trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be reversed absent an abuse of that discretion." *State v. McLeod*, 937 S.W.2d 867, 871 (Tenn. 1996) (citations omitted).

On appeal, the Appellant contends that the statement does not qualify as an excited utterance because the declarant, Mrs. Daniel, was no longer under the stress or excitement caused by the event. The Appellant contends that approximately four hours had passed since the shooting, that Mrs. Daniel had heard the Appellant throw down the gun and leave the house, and that she had crawled into bed with her deceased husband. The Appellant contends that the passage of four hours must be considered a primary factor in this determination. However, we note that the time interval is but one consideration in determining whether a statement was made under stress or excitement. Other relevant circumstances to consider include the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant, including such characteristics as age and physical or mental condition; and the contents of the statement itself, which may indicate the presence or absence of stress. *State v. Smith*, 868 S.W.2d 561, 574 (Tenn. 1993). Thus, contrary to the Appellant's argument, the lapse of time between the startling event and the declarant's statement does not necessarily preclude a finding that the statement was a spontaneous response to the event or that the declarant's stress or excitement had not diminished. *See State v. Binion*, 947 S.W.2d 867 (Tenn. Crim. App. 1996) (statements made thirty to thirty-five minutes after attempted rape were admissible as excited utterances because the victim continued to exhibit the stress and

excitement of the event); *see also State v. Stout*, 46 S.W.3d 689 (Tenn. 2001) (because the court had considered all the relevant factors, including the time span between the event and the statement, it was not an abuse of discretion for the trial court to determine that statements made twelve hours after the event were admissible as excited utterances where the declarant continued to be under the stress of the event); *State v. Richard Lee Anthony*, No. 01-C01-9504-CC-00115 (Tenn. Crim. App. at Nashville, Feb. 13, 1996) (statement qualified as an excited utterance despite thirty to thirty-five minute delay in calling police after robbery because the declarant was still nervous and shaking from the event); *State v. Lavelle Winfrey*, No. 02-C-01-9210-CC-00235 (Tenn. Crim. App. at Jackson, Feb. 23, 1994) (statement made by rape victim one to two hours after attack was admissible as an excited utterance because at the time the statement was made she was still upset and nervous as a result of the attack).

There is nothing in the record before us to indicate that Mrs. Daniel was not still under the stress and excitement of the startling event. She had sustained three gunshots wounds, one of which nearly severed her right arm, a second fired directly into her abdomen. In an attempt to escape, she crawled into a bedroom, where she was again shot. After the Appellant left the scene of the shooting, Mrs. Daniel was forced to crawl through the house searching for a telephone to call for help, while bleeding profusely, only to discover that the Appellant had disabled the phone lines. Unable to reach help, Mrs. Daniel eventually climbed into bed with her deceased husband, who had been shot in the face. She remained alone for four hours, suffering from critical injuries. Based upon the circumstances under which Mrs. Daniel's statement was made, we conclude that the trial court did not abuse its discretion in finding her statement admissible as an excited utterance. This issue is without merit.

VIII. Misleading and Intentionally False Testimony

The Appellant alleges that she was denied a fundamentally fair trial due to the admission of inconsistent testimony of two law enforcement officers, photographs of Mrs. Daniel's injuries, and the testimony of Mrs. Daniel concerning her multiple surgeries. Initially, she asserts that there is an inconsistency with regard to the testimony of Detective Jordan and Agent Miller regarding a surveillance tape at a Golden Gallon convenience store. Jordan testified that he saw the Appellant on the videotape; whereas, Miller testified that he saw nothing of interest on the tape and claimed that he did not recall Jordan even viewing the tape.

This claim is not appropriate for appellate review; it essentially is an attack on the credibility of the witnesses, an issue reserved for jury resolution. *Pappas*, 754 S.W.2d at 623. Moreover, the tape was not introduced at trial, and the Appellant did not cross-examine Miller or object to his testimony concerning the tape. Additionally, the Appellant does not introduce the contents of the tape on appeal.

The Appellant also claims that photographs of Mrs. Daniel introduced at trial (Exhibits 6-8) "were irrelevant and did not accurately reflect the nature or extent of Mrs. Daniel's injuries." Tennessee courts follow a policy of liberality in the admission of photographs in both civil and

criminal cases. *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). Accordingly, "the admissibility of photographs lies with the discretion of the trial court" whose ruling "will not be overturned on appeal except upon a clear showing of an abuse of discretion." *State v. Faulkner*, 154 S.W.3d 48, 67 (Tenn. 2005) (quoting *Banks*, 564 S.W.2d at 949). However, before a photograph may be entered into evidence, it must be relevant to an issue that the jury must decide, and the probative value of the photograph must outweigh any prejudicial effect that it may have upon the trier of fact. *State v. Vann*, 976 S.W.2d 93, 102 (Tenn. 1998), *cert. denied*, 526 U.S. 1071, 119 S. Ct. 1467 (1999); *see also State v. Braden*, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993); Tenn. R. Evid. 401, 403.

The challenged photographic exhibits depict the victim post-surgery, recovering from injuries suffered as result of the Appellant's conduct. The State argues that the photographs are relevant to show intent and premeditation. The challenged exhibits, which demonstrate numerous wounds to the victim's left arm and abdomen, are relevant to establishing premeditation in this first degree murder case. *See Faulkner*, 154 S.W.3d at 69. In holding that photographs were admissible for this reason, our supreme court held, "[t]he primary effect of seeing the photographs is not so much to inflame the viewer as to reveal to the viewer that, whoever inflicted the injuries upon the victim did so deliberately and premeditatively, striking the victim multiple times." *Id*. at 70. Moreover, in this case, we conclude that the exhibits demonstrate that the gunshots were deadly in nature. They accurately depict the nature and extent of the victim's injuries. Although the photographs were prejudicial to the Appellant's case, they were highly probative in establishing an element of the crime. We conclude that the trial court did not abuse its discretion in admitting the photographs.

The Appellant also claims that the trial court erred in allowing Mrs. Daniel to testify about her surgeries because "this testimony was not relevant during the guilt phase and should have been excluded." She adds that such testimony was inflammatory, and "the jury was left to speculate." Our review of the record indicates that Mrs. Daniel's testimony about her injuries was general in nature. She stated that she was hospitalized, underwent surgeries, and described the locations of her injuries. This testimony in no way inflamed the jury. This evidence aided in establishing premeditation. Viewing the Appellant's claims of misleading testimony separately or as a whole, we conclude that the trial court did not abuse its discretion in allowing the above referenced testimony and exhibits.

IX. Prior Allegations of Abuse

Next, the Appellant asserts that it was error to allow the State to elicit testimony from the Appellant regarding her past allegations of rape against a nineteen-year old man in order to challenge her credibility on cross-examination. The Appellant contends that the examination "went far beyond any probative effect on the issue of credibility and was inflammatory and prejudicial."

At trial, the Appellant chose to testify in her own behalf. On direct examination, the Appellant testified that her grandfather showed her a diagram of his penile implant, and he also showed her how the implant worked, having her inflate it. The Appellant further stated that, on more

than one occasion, after she had inflated the implant, her grandfather had put his penis in her mouth. However, the Appellant admitted that she never reported this abuse to anyone.

During cross-examination, the State, over defense objection, was permitted to ask the Appellant whether she had made prior allegations of rape or sexual abuse against anyone else. The following colloquy occurred between the prosecutor and the Appellant:

> Q Miss Daniel, to repeat my question while you were at Cumberland Hall you did make specific allegation of sexual abuse, didn't you?
> A I'm not sure if it was while I was a[t] Cumberland Hall, but yes, there was a report.
> Q You did report something?
> A Yes, I did.
> Q Didn't concern your grandfather, did it?
> A No, it didn't.
> Q Concerned a man name Nick, didn't it?
> A Yes.
> Q And you alleged that he had sexual[ly] abused you in February of 2002?
> A I don't know the exact date, but yes, that was reported.
> Q And the day after you got out of Cumberland Hall, I believe, on the 26th, of September, you met with Chief Myers and gave him a statement?
> A I don't know if it was after I left Cumberland Hall.
> Q Do you remember meeting with Chief Myers?
> A Yes, I do.
> Q You told him you had been raped, did you not?
> A Yes, I did.
> Q Did you tell him you'd gotten pregnant?
> A I don't believe that I told Chief Myers that, no.
> Q You didn't get pregnant, did you?
> A No, I didn't.
> Q And that allegation wasn't true either, was it?
> [Defense Counsel]: Objection, Your Honor, I think . . . .
> [The Court]: Overrule.
> Q Wasn't that a false allegation also?
> A Partly.
> Q Miss Daniel, over the years when you wanted to get away from your father or things weren't going right with your grandparents, you made a lot of allegations over the years, didn't you?
> A I don't know what you're talking about.
> Q And all of them weren't true, were they?
> A I don't - - there were reports made, but I don't know exactly what you're talking about.
> Q You made reports to people and investigations were made?
> A Yes, I don't know if they were investigations, but I know they were reports.

On appeal, the Appellant now asserts, relying on Tenn. R. Evid. 404(b) and 412, that it was egregious error to allow the admission of this testimony as "its probative value is outweighed by the danger of unfair prejudice." Initially, we are constrained to note that the inclusion of this evidence is not governed by Rule 404 or 412. Rather, the appropriate rule for consideration is Tenn. R. Evid. 608(b). The rule provides, in relevant part:

> Specific instances of a witness for the purpose of attacking or supporting the witness's character for truthfulness, . . . may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness. . . . The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:
>
> (1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;
>
> (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution. . . .
>
> (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court must upon request determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. . . .

Tenn. R. Evid. 608(b)(1)-(3).

As noted, defense counsel objected to this line of questioning. A bench conference was held in which the State responded to the objection by arguing that this separate incident of abuse which the Appellant did report went to her credibility. The trial court found that "it's relevant," and the testimony was put before the jury. The Appellant now asserts that, even if admission is governed by Rule 608, none of the required safeguards of the rule were followed. We disagree. Initially, we note that the rule requires a hearing outside the jury's presence only upon request. From the record before us, we find that no such request was made. Moreover, no request was made for a finding regarding the prejudicial effect outweighing the probative value. Additionally, from the trial court's finding that the evidence was "relevant," we must infer that the court found the evidence relevant to the issue of credibility.

The law of this state is clear that prior false reports of criminal activity are relevant to a witness's credibility. *State v. Wyrick*, 62 S.W.3d 751, 780 (Tenn. Crim. App. 1987); *State v. Walton*, 673 S.W.2d 166, 169 (Tenn. Crim. App. 1984). More specifically, we note that prior false allegations of rape are probative of a witness' truthfulness. *State v. Willis*, 735 S.W.2d 818, 822 (Tenn. Crim. App. 1987). Additionally, a factual basis existed that the prior report was false, as the

Appellant herself admitted that it was at least partially false. On direct examination, the Appellant testified regarding alleged sexual abuse by her grandfather, the purpose of which we must assume was to establish animosity and motive for the Appellant's shooting of her grandfather. Upon review, we find no error in the admission of the testimony, as it was relevant to the Appellant's credibility. Accordingly, this issue is without merit.

X. Recording of Confession

Lastly, the Appellant asserts that she was denied the right to a fair trial because her confession was not tape recorded. Specifically, she alleges "a policy or directive by this state-wide law enforcement agency against recording, in any manner, interviews or interrogations offends fundamental notions of fairness and leaves the citizen accused in a swearing match with law enforcement, a match the accused has very little chance of winning." The Appellant, however, is unable to point to any inaccuracies in her statement. Moreover, the Tennessee Constitution does not require the recording of custodial interrogations. *State v. Bobby G. Godsey*, No. E1997-00207-CCA-R3-DD (Tenn. Crim. App. at Knoxville, Sept. 18, 2000), rev'd on other grounds, 605 S.W.3d 759 (Tenn. 2001). In *State v. Nathan Allen Callahan*, No. 03C01-9507-CC-00203 (Tenn. Crim. App. at Knoxville, Apr. 24, 1997), *aff'd*, 979 S.W.2d 577 (Tenn. 1998), this court made the following observations:

> Although we agree that it is preferable to record electronically the reading of Miranda warnings, the waiver of rights, and custodial interrogations, we decline to impose this as a requirement for admissibility of statements. It inures to the benefit of law enforcement to record the processes by which it garners confessions by showing that the procedures were done properly and without coercion. It is rather curious that the detectives in this case chose to write out the Defendant's statement in longhand. Yet, neither the federal nor state constitutions mandate the use of recording devices.

The task of determining whether to impose an electronic recording requirement is more appropriately addressed to the General Assembly. *Godsey*, No. E1997-00207-CCA-R3-DD.

CONCLUSION

Based on the foregoing, the Appellant's convictions for first degree murder and attempted first degree murder are affirmed.

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DAVID G. HAYES, JUDGE